No. 15991

United States
Court of Appeals
for the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a Corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HOLBROOK, TARR & O'NEILL,
W. SUMNER HOLBROOK, JR.,

458 South Spring Street,
Los Angeles 13, California.

For Appellee:

ALBERT E. WELLER,
County Counsel;

J. B. LAWRENCE,
Deputy County Counsel,

316 Mountain View Avenue,
San Bernardino, California.

In the United States District Court,
Southern District, Central Division

1034-57 WB

HARSH CALIFORNIA CORPORATION, a California corporation,

Plaintiff,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic; S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as Members of and Constituting the Board of Supervisors of the County of San Bernardino, P. W. NICHOLS, County Auditor of the County of San Bernardino, G. LEON GREGORY, Tax Collector of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, AND RESTRAINING ORDER

Comes Now the plaintiff herein and for cause of action against the above-named defendants, alleges as follows:

I.

That the plaintiff is, and at all times mentioned herein has been, a corporation organized and exist-

ing under and by virtue of the laws of the State of California with its principal place of business in the County of San Bernardino, State of California;

That the County of San Bernardino is, and at all times mentioned herein has been, a body corporate and politic; that S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith are, and at all times mentioned herein were, the duly appointed and/or elected, qualified and acting members of the Board of Supervisors of the County of San Bernardino, State of California;

That P. W. Nichols is, and at all times mentioned herein was the duly appointed and acting County Auditor of the County of San Bernardino; that G. Leon Gregory is, and at all times mentioned herein was, the duly appointed and acting County Tax Collector of the County of San Bernardino; that Albert E. Weller is, and at all times mentioned herein was, the duly appointed and acting County Counsel of the County of San Bernardino, State of California.

II.

That the plaintiff herein is the lessee of certain real property and improvements owned by the United States of America located at which is generally known as the Barstow Marine Corps Supply Center, Barstow, California, pursuant to a lease from the United States of America, Defense Department, Department of the Navy; executed pursuant to the National Housing Act (63 Stat. 571; 12 USC 1748) as amended;

That a true and correct copy of said lease is

attached hereto, marked Exhibit "A" and made a part of this complaint as if set forth in full at this point;

That the County of San Bernardino did cause to be made an assessment of the possessory interest and all other right, title and interest in and to the improvements located on land described in lease recorded in Book 3168, page 527, Official Records of the County of San Bernardino under Code Area 5601 and as Parcel 05436178, on the assessment or tax roll for the said County of San Bernardino for the tax year 1957-58 and did extend and levy taxes thereon against the said "possessory interest and all other right, title and interest" of plaintiff taxes in the total sum of $21,388.00;

That on or about August 1, 1957, defendant Tax Collector of the County of San Bernardino did cause to be prepared and issued a tax statement on the aforesaid assessment, issued to plaintiff and did deliver the said statement to plaintiff and did demand of plaintiff the payment of the said taxes on or before August 31, 1957, under threat of punishment for refusal so to do by seizure and sale of plaintiff's leasehold interest under and by virtue of its lease from the United States of America together with penalties in the amount of 8 per cent of the aforesaid assessment or the sum of $1,711.04; that a true and correct copy of said statement, demand and threat is attached hereto, marked Exhibit "B" and made a part of this complaint as if set forth in full at this point;

That under the provisions of Section 408 of the

Housing Act of 1955 as amended by Section 511 of the Housing Act of 1956 (Pub. Law 1020, 70 Stat. 1110) it is expressly provided that:

"Nothing contained in the provisions of Title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: Provided, That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property."

That pursuant to the provisions of the aforesaid law, the Secretary of Defense did issue its Department of Defense Directive No. 4165.30 of November 16, 1956, and Department of Navy Instruction No.

11101.29 of June 3, 1957, and Bureau of Yards and Docks Instruction No. 11101.42 of July 12, 1957, which directed and provided that the designee of the Secretary of Defense for this purpose, as to the aforesaid lease to plaintiff, was A. D. Hunter, Captain, CEC, U.S.N., District Public Works Officer for the Eleventh Naval District, Department of the Navy of the United States of America;

That pursuant to the aforesaid directives, the said Captain A. D. Hunter did, in accordance with law and in the manner provided, determine that the payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property (without regard to the amounts as may be appropriate for any other expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting or any other service or facility which are customarily provided by the State, county, city, or other local taxing authority with respect to other similar property) was in the amount of $27,759.00 for the tax year 1957-58;

That attached hereto and made a part hereof as Exhibit "C" is a true and correct copy of said letter of notification to the defendant Board of Supervisors of the County of San Bernardino together with the determination aforesaid delivered to said Board of Supervisors on August 13, 1957, and the whole thereof is made a part hereof as if set forth in full herein at this point; that as set forth in said determination the said designee of

the Secretary of Defense, to wit, Captain A. D. Hunter, did find that the Federal Government had contributed to the maintenance of operation of schools for which taxes are collected from plaintiff by the said defendant County Tax Collector of the County of San Bernardino, the sum of $22,934.00 and that in addition thereto did contribute in school construction for the said aforesaid schools the additional sum of $4,825.00 or the total sum of $27,759.00.

III.

That the amount of the aforesaid offset and deduction determined as aforesaid by the said Captain A. D. Hunter, District Public Works Officer for the Eleventh Naval District, Department of the Navy of the United States of America, under and pursuant to the provisions of Section 408 of the Housing Act of 1955, as amended, exceeds, and at all times mentioned herein has exceeded, the claimed amount of local taxes on the said possessory interest of plaintiff under the aforesaid lease by the sum of $6,371.00 and by virtue of such fact there is no sum now due, owing or unpaid by plaintiff on account of local taxes or assessments to defendant County of San Bernardino or any of the public entities for which said County collects taxes for the tax year 1957-58 by reason of the aforesaid "possessory interest and all right, title and interest" of plaintiff under and by virtue of the aforesaid lease from the United States of America.

IV.

That the said letter together with the determination were received by the said Board of Supervisors and the members thereof on or about August 14, 1957; that in addition thereto plaintiff did on August 15, 1957, make demand that the said defendants comply with the said determination and allow the necessary offset and did forward in addition thereto a copy of the said determination to the said Board of Supervisors; said demand was received by the said Board of Supervisors on or about August 16, 1957; that a true and correct copy of said demand is attached hereto as Exhibit "D" and made a part hereof as if set forth in full at this point.

V.

That despite the aforesaid determination of the designee of the Secretary of Defense acting pursuant to the provisions of Section 408 of the Housing Act of 1955, as amended, defendant County of San Bernardino and defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith as members of, and constituting the Board of Supervisors of said County, defendant P. W. Nichols as County Auditor, defendant G. Leon Gregory as County Tax Collector and defendant Albert E. Weller as County Counsel, and each and all of them have failed, refused and neglected and still fail, refuse and neglect to cancel the aforesaid local assessment or tax to plaintiff in the sum of $21,388.00 for the tax year 1957-58.

all as set forth in the provisions of Sections 4986 to 4994 inclusive, of the Revenue and Taxation Code of the State of California, as being erroneous, illegal or void and constituting less than the amount of offset or deduction required to be charged against said assessment or tax by the aforesaid paramount Federal law, to wit, Section 408 of the Housing Act of 1955, as amended, and have failed, refused and neglected and still fail, refuse and neglect to determine as provied in said provision of the Revenue and Taxation Code of the State of California, as a matter of record in said County that there is not now due, owing or unpaid from plaintiff to defendant County or to defendant G. Leon Gregory as its County Tax Collector any sum whatsoever by virtue of said assessment or taxes under and by virtue of the superseding effect of said Federal law and the aforesaid binding determination of said designee of the Secretary of Defense made thereunder.

VI.

That by virtue of the foregoing determination by the aforesaid Captain A. D. Hunter, acting for and as designee of the Secretary of Defense, and under the provisions of Section 4986 of the Revenue and Taxation Code of the State of California, defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of defendant County have had "satisfactory proof" that the aforesaid taxes for the tax year 1957-58 claimed to be due on plaintiff's "possessory interest" under

and by virtue of the aforesaid lease from the United States of America are "erroneously" and "illegally" charged against plaintiff and under the aforesaid provisions of said Revenue and Taxation Code they are thereby under a duty, having first had the "written consent" of defendant County so to do, to order defendant P. W. Nichols as County Auditor to cancel the aforesaid taxes;

That by virtue of the aforesaid facts and provisions of said sections of the Revenue and Taxation Code of the State of California, defendant Albert E. Weller as County Counsel is under a duty to give "written consent" to such order of cancellation;

That upon receipt of such order and authorization from defendant Board of Supervisors, defendant P. W. Nichols, as County Auditor, will be under a duty to cancel and expunge from the assessment and tax roll of said County the aforesaid assessment and tax and G. Leon Gregory, as Tax Collector, will be relieved from any obligation or duty to attempt to collect or enforce such tax against plaintiff;

That although the aforesaid defendant County officers are under a present or future duty to authorize cancellation of, cancel and refrain from attempting to collect from plaintiff any tax by virtue of the aforesaid assessment to it on "its possessory interest and all right, title and interest" under and by virtue of the aforesaid lease from the United States of America, nevertheless plaintiff, as a private citizen and taxpayer from and after May 2,

1950, the date of the final decision of the California Supreme Court in Security First National Bank v. Board of Supervisors, 35 Cal. 2d 323; 217 P. 2d 948, has no right or power to compel performance of such duty and under the law of the State of California has no right, remedy or power of any kind whatsoever to require performance of such duty and recognition by defendants of the effect of such valid determination as to offset any deduction all as provided by the provisions of the aforesaid Federal Statute here involved, to wit, Section 408 of the Housing Act of 1955, as amended;

That the only laws of the State of California which permit an immediate determination as to validity in a court of law applicable to local taxes and assessments are the provisions of Sections 5136 to 5143, respectively, of the Revenue and Taxation Code of the State of California; that such provisions permit a taxpayer to pay a tax under protest only when the whole "assessment" or "a portion" of the assessment as originally made by the County Assessor is claimed by such protestant to be "void" in whole or in part;

That the assessment of plaintiff's "possessory interest and all right, title and interest" under and by virtue of the aforesaid lease from the United States of America was not illegal, erroneous or void in whole or in part when made by the County Assessor of defendant County and its erroneousness and illegality arise solely by virtue of the fact that subsequent to the making of such assessment the aforesaid determination was made by the aforesaid

Captain A. D. Hunter as designee of the Secretary of Defense of the aforesaid offset and deduction under the provisions of Section 408 of the Housing Act of 1955, as amended; that by reason thereof plaintiff has no remedy or right in the law of the State of California to bring any suit for recovery of such tax under the protest provisions of the aforesaid Revenue and Taxation Code;

That the only other remedy or right of a local taxpayer to secure a determination as to the validity of a local tax or assessment under the law of California is by virtue of the provisions of Sections 5096-5107 of the Revenue and Taxation Code of the State of California which require any taxpayer seeking to recover a tax erroneously or illegally collected from him first to file a refund claim therefor with the Board of Supervisors and, until such claim has first been denied, or a period of six months inaction thereafter has elapsed, the taxpayer has no right to have said matter adjudicated as to its legality in any court of law;

That as set forth on the tax statement delivered by defendant Tax Collector to plaintiff, (Exhibit "C"), if plaintiff does not pay the claimed taxes on or before August 31, 1957, it will become liable to a penalty thereon in the amount of 8 per cent thereof, or the sum of $1,711.04, and to immediate seizure and sale by said Tax Collector of plaintiff's leasehold estate as aforesaid under and by virtue of its lease from the United States of America;

That by reason of each and all of the aforesaid, plaintiff has no plain, adequate and speedy remedy

of law in the courts of the State of California for the determination of the effect of the aforesaid determination of offset and deduction against its local taxes made as aforesaid by Captain A. D. Hunter, acting as designee of the Secretary of Defense under the provisions of Section 408 of the Housing Act of 1955, as amended.

VII.

That this is a suit of a civil nature where the matter in controversy, exclusive of interests and costs, exceeds the sum of $3,000.00 and there exists an actual controversy within the meaning of Section 2201, Title 28 of the U. S. Code between plaintiff and defendants as to the force and effect of the offset or deduction from local assessments and taxes authorized and required by Section 408 of the Housing Act of 1955 as amended by Section 511 of the Housing Act of 1956 (Pub. Law 1020, 70 Stat. 1110) when such local assessments and taxes are levied on the "possessory interest and all other right, title and interest" of plaintiff under and by virtue of its lease of certain government lands and buildings, said lease, having been executed to the provisions of title VIII of the National Housing Act. Jurisdiction is founded on Title 28, Section 1331.

Wherefore, plaintiff prays as follows:

1. That this Court declare that the offset and deduction in the sum of $27,759.00, as determined, pursuant to Section 408 of the National Housing

Act of 1955 as amended, by the designee of the Secretary of Defense to have been expended by the United States of America with respect to such property is a valid and complete offset and deduction from 1957-58 taxes claimed by defendant County to be owing to it from plaintiff in the sum of $21,388.00 on account of plaintiff's "possessory interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, and that therefore there is no sum at all due, owing or unpaid to defendant County from plaintiff on account of said 1957-58 taxes.

2. That this Court permanently enjoin and restrain the defendants, County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation, with them from doing any and all acts to enforce the said tax in the sum of $21,388.00 or any part thereof or to enforce any penalty against plaintiff or doing any other acts in connection therewith saving and excepting as follows:

a. As to defendants S. Wesley Break, Daniel

Mikesell, Magda Lawson, Paul Young and Nancy Smith as members of and constituting the Board of Supervisors of the County of San Bernardino to cancel the said tax in accordance with the provisions of Section 4986 of the Revenue and Taxation Code of the State of California;

b. As to defendant Albert E. Weller as County Counsel of the County of San Bernardino to give "written consent" to said Board of Supervisors for such cancellation;

c. As to defendant P. W. Nichols as County Auditor of the County of San Bernardino to cancel such tax and assessment on the assessment and tax roll of the County of San Bernardino for the tax year 1957-58;

3. That pending the final hearing and determination of this cause upon its merits, the Court issue a temporary restraining order restraining the defendant and each and all of them from doing any and all acts to enforce or collect the alleged tax on plaintiff's "possessory interest and all other right, title and interest" in the aforesaid lease from the United States of America in the sum of $21,388.00 or any part thereof;

4. That the plaintiff have judgment for its costs of suit and for such other and further relief as to the Court may seem meet and proper in the premises.

HOLBROOK TARR & O'NEILL,
By /s/ W. SUMNER HOLBROOK, JR.,
By /s/ FRANCIS H. O'NEILL,
Attorneys for Plaintiff.

EXHIBIT B

County of San Bernardino

Statement of Unsecured Property Taxes

G. Leon Gregory, County Tax Collector, Rm. 227 Courthouse, San Bernardino, California, Phone 6811

This bill when properly stamped becomes a receipt for the payment of taxes on the property described hereon for the fiscal year 1957-58.

Name of Assessee as of First Monday in March, 1957, and Address as Appears on Assessment Record:

Harsh California Corp.,
P. O. Box 991,
Portland 7, Oregon.
The Possessory Interest and All Other Right, Title and Interest in and to the Improvements Located on Land Described in Lease Recorded in Bk. 3168, Pg. 527, Official Records of County of San Bernardino.

For Information Concerning These Assessed Values and Property Assessed, Contact County Assessor, Personal Property Division, Courthouse, San Bernardino, Calif.

1957

Land:	52250
Improvements:	356180
Personal Property:	19330
Exempt:	....

Net Assessed Value of Property:	427760
Solvent Credits	....
Tax Rate Per $100:	500
Flood Tax:	....
Special Assm't:	....

Important Second Notice

This Statement Will Be Delinquent if Not Paid on or Before August 31, and Thereafter a Penalty of 8% Will Attach as Provided by Law.

Please Disregard This Notice if Payment Has Been Tendered Since August 1st.

Fiscal Year—July 1, 1957, to June 30, 1958.

Do Not Detach This Stub

1957

Give These Numbers When Inquiring About This Bill.

Code Area:	5601
Parcel:	05436178
Code Area:	5601
Parcel:	05436178

To Insure Proper Credit of Your Payment, Return Entire Tax Statement With Your Remittance. (See Para. No. 9 on Reverse Side.)

Remit Only Total and Last Amount in This Column

Total Tax:	$21,388.00
Total Tax	$21,388.00

Important Information

1. Assessment Date: Annually the Assessor shall assess all taxable property in the County to the persons owning, claiming, possessing or controlling it at 12 o'clock meridian of the first Monday in March. (Sec. 405 Revenue and Taxation Code.)

2. Declaration of Personal Property on Real Estate: Personal property to be made a lien on real estate must be declared to the Assessor prior to the last Monday in May.

3. Ownership on the Lien Date Determines the Obligation to Pay Taxes: The disposal of property after the lien date does not relieve the assessee of his tax liability.

4. Questions Concerning Assessment: All questions concerning assessment problems as concerns this tax statement should be directed to the Attention of the County Assessor, Courthouse, San Bernardino, California.

5. Taxes Due: All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. (Sec. 2192 Revenue & Taxation Code.) The Tax Collector may enforce the collection of unsecured property taxes at any time subsequent to the entry of the tax lien on the assessment roll. (Sec. 2902 Revenue & Taxation Code.)

6. Delinquency Date: Taxes on the Unsecured Roll are delinquent if not paid on or before August

31, at 5 p.m. regardless of when the property is discovered and assessed, and thereafter a penalty of eight per cent attaches to them. (Sec. 2922 Revenue & Taxation Code.)

7. Enforcement of Payment: Taxes on the Unsecured Roll May Be Collected by Seizure and Sale of Any of the Following Property Belonging or Assessed to the Assessee: (A) Personal Property, (B) Improvements, (C) Possessory Interests. (Sec. 2914 Revenue & Taxation Code.)

8. Exemption for Military Service: Claims for military exemption must be filed with the County Assessor each year between the first Monday in March and the last Monday in May. Exemptions are applicable only to taxes accruing for the assessment year in which filing is made. Any person who claims military exemption for the first time must present evidence in support of such claim.

9. Remittances: Payments by check, cashier's check or money orders, payable to G. Leon Gregory, County Tax Collector, should be in the exact amount of the total tax due. Do not mail currency or coin. Stamps Will Not Be Accepted. A self-addressed and stamped envelope will facilitate the return of the receipt. Do Not Remove or Detach Stub from this statement as it is needed for accounting procedures and application of payment.

EXHIBIT C

District Public Works Office
Eleventh Naval District
San Diego 32, California

In Reply Refer to:
Ser 12910/DD-500
Aug. 13, 1957

Board of Supervisors,
County of San Bernardino,
San Bernardino, California.

Gentlemen:

This letter refers to taxation of the Navy Title VIII (Wherry) housing project known as Barstow Garden Homes, located at the Marine Corps Supply Center, Barstow, California (FHA No. 138-80003).

Section 408 of the Housing Amendments of 1955 as amended by Public Law 1020/84th Congress, Second Session (70 Stat. 1110) provides that:

"* * * no * * * taxes or assessments * * * on the interest of [lessees of Wherry Housing Project] shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus, (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or main-

tenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the state, county, city or other local taxing authority with respect to such other similar property: * * *"

Accordingly, there is enclosed herewith my determination in accordance with the above statutory provision, and pursuant to the authority delegated thereunder to me as the duly authorized designee of the Secretary of Defense.

Sincerely yours,

A. D. HUNTER,

Captain, CEC, USN, District
Public Works Officer.

Enclosure:

Executed Determination pursuant to Section 408 of the Housing Amendments of 1955 as amended by Public Law 1020/84th Congress.

Determination

Pursuant to Section 408 of the Housing Amendments of 1955 as Amended by Public Law 1020/84th Congress

Acting as the duly authorized designee of the Secretary of Defense, for purposes of Section 408 of the Housing Amendments of 1955 as amended, pursuant to the delegations of authority contained in Department of Defense Directive No. 4165.30 of November 16, 1956, and the Department of Navy Instruction No. 11101.29 of June 3, 1957, and the Bureau of Yards and Docks Instruction No.

11101.42 of July 12, 1957, I hereby determine the sum of $27,759.00 to be the amount equal to the sum of payments made by the Federal Government to the County of San Bernardino, California, with respect to the Navy Title VIII (Wherry) housing project known as Barstow Garden Homes (FHA No. 138-80003), applicable to the 1957-58 tax year.

Note: The absence from this determination of a statement of the expenditures made by the Federal Government or by the lessee for the provision or maintenance of other public services or facilities which are customarily provided with respect to such other similar property shall not be construed to preclude their inclusion in future determinations.

The above total is comprised of the following items:

A. Capital Improvements	
School construction (FL 815 aid) (interest and amortization for 1 year)	$ 4,825.00
B. Maintenance and Operation	
Schools (FL 874 aid)	22,934.00
Total Deductions	$27,759.00

Signed this 9th day of August, 1957.

/s/ A. D. HUNTER,
Captain, CEC, USN, District Public Works Officer,
Eleventh Naval District.

EXHIBIT D

Harold Schnitzer, President

Phone: BRoadway 3405

Harsh California Corp.

Managers of:

Barstow Marine Corps
Housing Project
Barstow, California
FHA Project No. 138-80003-Navy-1

Home Office
S. W. Twelfth & Clay Streets
Portland 1, Oregon
P. O. Box 991, Portland 7, Oregon

August 15, 1957

Board of Supervisors
County of San Bernardino
San Bernardino, California

Gentlemen:

On August 13, 1957, Captain A. D. Hunter, District Public Works officer, Eleventh Naval District, advised your office that a determination had been made by the Department of Defense of the credit due against taxes assessed on the Barstow Wherry Housing Project at Barstow, California. This credit has been determined pursuant to Section 408, of the Housing Amendments of 1955 as amended by Public Law 1020 of the 84th Congress.

We enclose a copy of the determination made by the Department of the Navy although you have received such a determination directly from them.

This determination indicates a deduction of $27,-759.00 which is to be offset against the total tax bill for the fiscal year July 1, 1957 to June 30, 1958 in the amount of $21,388.00.

This letter will constitute our written demand on the County of San Bernardino to give full recognition to the determination of the tax credit made by the Department of Defense which in our case eliminates the tax against the Barstow Wherry Project for the fiscal year July 1, 1957 to June 30, 1958.

Very truly yours,

HARSH CALIFORNIA CORPORATION,

HAROLD J. SCHNITZER,
President.

HJS:md

CC: Federal Housing Administration, Los Angeles, California; Federal National Mortgage Association, Los Angeles, California; District Public Works Office, San Diego, California.

Duly verified.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified complaint of plaintiff in this action, it appears to the satisfaction of the Court from said Complaint that this is a proper case for issuance of an Order directed to

defendants, County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young, and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, to show cause why they should not be restrained and enjoined in accordance with the prayer of said plaintiff.

It Is Therefore Ordered pursuant to the provisions of Federal Rule of Civil Procedure 65(a) that said defendants and each and all of them appear before this Court in the Court Room of the Honorable Wm. C. Byrne, District Judge, in the United States Courthouse, at Los Angeles, California, at 9:45 o'clock in the a.m., or as soon thereafter as counsel can be heard, on September 6, 1957, then and there to show cause, if any, why a preliminary injunction should not be issued pending the trial of this action, as follows:

(a) That this Court declare that the offset and deduction in the sum of $27,759.00, as determined pursuant to Section 408 of the National Housing Act of 1955 as amended, by the designee of the Secretary of Defense to have been expended by the United States of America with respect to such property is a valid and complete offset and deduction from 1957-58 taxes claimed by defendant County to be owing to it from plaintiff in the sum of $21,388.00 on account of plaintiff's "possessory

interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States, and that therefore there is no sum at all due, owing or unpaid to defendant County from plaintiff on account of said 1957-58 taxes.

(b) That this Court permanently enjoin and restrain the defendants County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation with them, from doing any and all acts to enforce the said tax in the sum of $21,388.00 or any part thereof or to enforce any penalty against plaintiff or doing any other acts in connection therewith saving and excepting as follows:

1. As to defendants S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith as members of and constituting the Board of Supervisors of the County of San Bernardino to cancel the said tax in accordance with the provisions of Section 4986 of the Revenue and Taxation Code of the State of California;

2. As to defendant Albert E. Weller as County Counsel of the County of San Bernardino to give "written consent" to said Board of Supervisors for such cancellation;

3. As to defendant P. W. Nichols as County Auditor of the County of San Bernardino to cancel such tax and assessment on the assessment and tax roll of the County of San Bernardino for the tax year 1947-58;

(c) That the plaintiff have judgment for its costs of suit and for such other and further relief as to the Court may seem meet and proper in the premises.

It Is Further Ordered that a copy of the Complaint herein and the Memorandum of Points and Authorities, filed concurrently herewith, and a copy of this Order be served on each of the defendants herein, at least 8 days before the date on which said defendants are ordered to appear before this Court to show cause as herein provided.

Dated Aug. 30, 1957.

Presented by:

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, Jr.
By /s/ FRANCIS H. O'NEILL.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER

It appearing to the Court that the defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this Court and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be heard and a hearing had on plaintiff's motion for a preliminary injunction in that the claimed taxes in the sum of $21,388.00 are delinquent if not paid on or before August 31, 1957, and a penalty of eight (8%) per cent of said sum or the amount of $1,711.04, will be claimed in addition thereto and defendant County will attempt to seize and sell plaintiff's leasehold estate under and by virtue of its lease from the United States of America for nonpayment of such tax.

It Is Ordered that defendants County of San Bernardino, a body corporate and politic; S. Wesley Break, Daniel Mikesell, Magda Lawson, Paul Young and Nancy Smith, as members of and constituting the Board of Supervisors of the County of San Bernardino; P. W. Nichols, County Auditor of the County of San Bernardino; G. Leon Gregory, Tax Collector of the County of San Bernardino, and Albert E. Weller, County Counsel of the County of San Bernardino, and each of them, their agents, servants, employees, attorneys and all persons in active consort, and in participation, with them be, and they hereby are, restrained from taking any steps whatever leading to the enforcement or col-

lection of said claimed tax in the amount of $21,-388.00;

And whereas the full sum of this claim in the amount of $21,388.00 plus penalties is impounded in escrow by the Federal National Mortgage Association pending instructions that it be or not be turned over to the County Tax Collector, that this temporary restraint is on condition that bond be filed by plaintiff in the sum of $2000.00; and

It Is Further Ordered that this Order expire within 10 days after entry unless in such time the order for good cause shown is extended for a like period or unless the defendants consent that it may be extended for a longer period; and

It Is Further Ordered that plaintiff's application for a preliminary injunction be set down for hearing before the Honorable Wm. C. Byrne, Judge of this Court, on Sept. 6, 1957, at 9:45 o'clock a.m.

Issued at 3:40 p.m. on Aug. 30, 1957.

/s/ BEN HARRISON,
Judge of the United States
District Court.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FEDERAL RULES CIVIL PROCEDURE

Defendants respectfully request the Court to dismiss the above-entitled action pursuant to Rule

12(b), subsection 6, of the Rules of Civil Procedure, upon the ground that plaintiffs have not stated a claim upon which relief can be granted.

Injunctive Relief

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

* * *

Plaintiff has two plain, adequate and speedy remedies at law in the courts of the State of California. He is therefore not entitled to injunctive relief, nor to declaratory relief, nor to any other Federal remedy. The cause should be dismissed.

Dated.....

ALBERT E. WELLER,
County Counsel;

/s/ J. B. LAWRENCE,
Deputy, Attorneys for
Defendants.

/s/ KENNETH CLEAVER,
Of Counsel.

Affidavit of service by mail attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 14, 1957.
At: Los Angeles, Calif.
Present: Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Chas. E. Jones;
Reporter: Samuel Goldstein;
Counsel for Plaintiff: W. Sumner Holbrook, Jr.;
Francis H. O'Neill;
Counsel for Defendants: J. B. Lawrence.

Proceedings: For hearing motion to dismiss complaint.

At request of plaintiff the complaint is amended by interlineation by adding at the end of paragraph 7 "jurisdiction is founded upon Title 28, Sec. 1331."

It Is Ordered that the temporary restraining order is continued until Oct. 17, 1957.

It Is Ordered that cause is continued to Oct. 17, 1957, 9:45 a.m., for further hearing on motion to dismiss.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk.

WB—10/14/57.

DOCUMENTS LODGED WITH COURT

Military Housing

Enactment of the proposed measure would result in no additional cost to the Government.

This report has been coordinated within the National Military Establishment in accordance with procedures prescribed by the Secretary of Defense.

The Navy Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Sincerely yours,

JOHN T. KOEHLER,
Acting Secretary of the Navy.

Military Housing

For text of Act see p. 582

Senate Report No. 410, May 20, 1949 [to accompany S. 1184]. House Report No. 854, June 20, 1949 [to accompany S. 1184].

The House Report repeats in substance the Senate Report

House Report No. 854

The Committee on Banking and Currency, to whom was referred the bill (S. 1184) to encourage construction of rental housing on or in areas adjacent to Army, Navy, Marine Corps, and Air Force installations, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

General Statement

The purpose of the bill is to encourage private

enterprise to construct rental housing to serve the needs of personnel at military installations, primarily through (1) the provision of a special form of mortgage insurance designed to meet the particular problems involved, (2) the leasing of sites by the Military Establishment free from the right of revocation, and (3) the provision of utility services by the Military Establishment on a long-term basis.

Under existing legislation there is no specific authority which permits the Federal Housing Administration to assist in the financing of housing to serve the personnel of military installations on any different basis than other housing not related to military personnel. Consequently, in analyzing proposed projects to provide housing for military personnel, the FHA cannot disregard the special risks involved by reason of the location and the question as to the permanent nature of the military installations.

The bill would amend the National Housing Act by providing for a new title establishing a system of mortgage insurance for rental housing to serve the personnel of military and naval installations on substantially the same basis as is now available under section 608 of title VI. In view of the special problems involved and the different risk characteristics presented by such housing, an entirely new insurance fund is proposed for the operation of this new title.

The primary difference between the mortgage insurance proposed under this new title VIII and that available under section 608 is that the bill does

not require the Commissioner to make a determination of acceptable risk. In lieu of such a determination, this bill would permit the Commissioner to accept a certification from the Military Establishment that the housing is necessary, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to curtail substantially the activities at such installation.

Since the need for the housing and all information in regard to the permanency of the military installation are matters peculiarly within the knowledge of the military, the FHA should not be required to make a determination of acceptable risk, but should be permitted to accept such certification as determination of the need for the housing and the probability of the permanency of the installation. The FHA, nevertheless, would require the proposed project to demonstrate a rental income sufficient to pay operating and debt-service charges, and would also require the project to meet sound standards of construction, design, and livability.

The provisions of the bill would authorize the Military Establishment to lease or sell lands to builders of housing at military installations. In the case of leases of building sites, the leases (which would be for a period of not less than 50 years to run from the date the mortgage on the leasehold is executed) could be made without regard to the existing limitation with respect to right of revocation by the Government in the event of the declaration of a national emergency. The existing right of

revocation is of course a prohibitive obstacle to private mortgagee participation in such building. Also, difficulties in obtaining suitable sites is frequently a deterrent to the development of housing by private enterprise in the vicinity of military installations, particularly in isolated areas. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment. In the case of sales of building sites at military establishments whenever the Secretary of the Army, Navy, or Air Force determined that it would be in the interest of national defense to do so he could sell at fair value as determined by him any interest in real property under his jurisdiction, notwithstanding any limitations or requirements of law with respect to use or disposition of such property.

Lack of adequate utility facilities, particularly in the isolated areas, can be a serious obstacle to the development of housing by private enterprise in the vicinity of military installations. In some cases the only utilities available are those located on the military installation itself. To overcome this obstacle the bill would provide that the Secretary of the Army, Navy, or Air Force would be authorized to sell and contract to sell to purchasers within, or in the immediate vicinity of military installations, such utilities and related services as are not otherwise available from local private or public sources. The utilities and related services authorized to be sold are electric power, steam, compressed air,

water, sewage and garbage disposal services, gas, ice, mechanical refrigeration, and telephone service. As noted above, however, any utility or related service provided and sold under this authority shall not be so provided unless it is determined that the utility or related service is not at the time of such sale or contract to sell, available from a private or other public source, and that the furnishing thereof is in the interest of national defense.

As heretofore stated, the mortgage insurance under this proposed new title is substantially the same as is now available under section 608 of title VI. The bill provides a mortgage limitation of $5,000,000, and not to exceed 90 per cent of the Commissioner's estimate of the replacement cost, and not to exceed $8,100 per family unit for such part of such property or project as may be attributable to dwelling use. These provisions are comparable to the existing limitations provided in section 608 and from the experience of FHA in mortgage insurance under section 608, such mortgage amounts should be adequate to interest builders and private capital in the production of such projects. The maximum interest rate is fixed at 4 per cent. Mortgages insured under this new title would be eligible for secondary market purchase by the Federal National Mortgage Association.

To provide for the insurance of military housing mortgages there would be created a military housing insurance fund to which there would be authorized to be appropriated the sum of $10,000,000. For immediate needs pending such appropriation, the Com-

missioner would be directed to transfer the sum of $1,000,000 to such fund from the war housing insurance fund created by section 602 of the National Housing Act, as amended, and such amount would be reimbursed to the war housing insurance fund upon the availability of the appropriation authorized. The insurance fund would be supported by premium charges for the insurance of mortgages which the Commissioner is authorized to fix at an amount equivalent to not less than one-half of 1 per cent per annum nor more than an amount equivalent to 1½ per cent per annum of the amount of the principal obligation of the mortgage outstanding at any time, without taking into account delinquent payments or prepayments.

The aggregate amount of principal obligations of all mortgages insured under the military housing insurance fund would be limited to $500,000,000 except that with the approval of the President such aggregate amount could be increased to not to exceed $1,000,000,000. Further, the military housing insurance fund could not be used to insure mortgages after July 1, 1951, except pursuant to a commitment to insure issued on or before such date or a mortgage given to refinance an existing mortgage insured by the fund and which does not exceed the original principal amount and unexpired term of such existing mortgage.

In order to adequately protect holders of mortgages insured under the provisions of this bill from subsequent action by the United States to acquire title to the mortgaged property, provision would be

made that if during the time the mortgage is insured and before the mortgagee has received the benefits of insurance, the United States acquires, or commences eminent domain proceedings to acquire the mortgaged property for the use of the National Military Establishment, the mortgagee may, at its election receive the benefits of the insurance as provided notwithstanding the fact that the mortgage may not be in default.

Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. They stressed, in terms of the efficiency of the armed services, the urgent need for adequate housing facilities to serve families of their personnel. They made it abundantly clear that, to attract and hold the highly trained, experienced, and technical personnel now required by the Departments of the Army, the Navy, and the Air Force, it is essential that this personnel be afforded an opportunity to live comfortable and normal lives, insofar as military duty permits, on a reasonable parity in terms of housing, with the average American citizen. The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to re-enlist at the expiration of their enlistment terms.

Adequately training men to maintain and operate our present-day intricate war machines is an exten-

sive and costly undertaking. Whenever a trained man fails to re-enlist, the investment of the Government in his training is lost to the armed services involved and another man must be given similar training. The Air Force in September 1948 made an analysis of its enlisted personnel which indicated that only 59 per cent of all married enlisted personnel intended to re-enlist. However, 79 per cent indicated that they would re-enlist if the Government were to provide family housing. Those failing to re-enlist include some of the best trained and most able men.

Normally the housing units needed at each installation would be supplied through the construction of public quarters by the military forces. However, meeting this present need in its entirety through the use of public funds would require a tremendous direct expenditure by the Federal Government. It is therefore extremely important that private builders be encouraged to construct as much of this housing as possible.

The bill is designed to encourage them to construct such housing. Where housing is constructed with mortgage insurance under the bill, no cost to the Government would be involved unless, through deactivation or curtailment of military installations or other causes there are losses in excess of the premium and other payments by the mortgagee to the insurance fund. In any event, such losses would not approach the cost of construction by the Federal Government.

Testimony presented to the committee emphasized

that housing constructed with mortgage insurance under this bill cannot possibly meet more than a portion of the military housing need either in terms of total units required or in terms of desirable rent levels. However, such mortgage insurance should encourage the production of substantial additions to the housing supply available to personnel at military installations and at rentals comparable to or lower than those which many of them are now paying for inadequate quarters. Such private-housing developments should increasingly free and make available to enlisted personnel and junior officers the existing public quarters on military installations.

Title II and Title VI Mortgage Insurance

Authorization

Section 6 of the bill, added by your committee, would increase by $500,000,000 the total mortgage insurance authorization for title II of the National Housing Act. Of this sum $300,000,000 would be available immediately, and $200,000,000 additional would be available with the approval of the President. This title provides for the regular, permanent mortgage insurance program of the FHA for both sales and rental housing. As the authorization is now almost exhausted, it is essential that an increase be granted promptly in order that needed housing construction will not be delayed. The increase contained in section 6 of the bill is not intended to provide the full amount needed, but will prevent delay in mortgage insurance operations under title II

until your committee has had an opportunity to examine fully a request for a larger amount.

Subsection (b) of section 6 of the bill would continue the mortgage insurance authorization under section 608 of title VI from June 30, 1949, until August 31, 1949. In view of the fact that nearly all of the multiple unit rental insurance under the FHA program is done under this section and in view of the continuing need for rental accommodations throughout the country, the committee deems it necessary to provide for this interim extension until it has an opportunity to consider the bills before it dealing with amendments to the National Housing Act in general.

Section-By-Section Analysis of the Bill as Amended

Section I:

This section would add a new title VIII to the National Housing Act, as amended. This new title VIII providing for military housing insurance would be comprised of eight sections numbered 801 to 808, inclusive.

The terms used in this new title VIII would be defined in section 801. The definitions are similar to those in other titles of the National Housing Act except that a definition of the term "military" is added to make it clear that the term includes the Army, Navy, Marine Corps, and Air Force.

A military housing insurance fund of $10,000,000 would be created by section 802 for use by the Federal Housing Commissioner as a re-

84th Congress, 2d Session
House Report No. 2363

Housing Act of 1956

Report
of the
Committee on Banking and Currency
House of Representatives
Eighty-Fourth Congress
Second Session

on H. R. 11742

[Seal]

June 15, 1956—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

United States Government Printing Office
Washington: 1956

78813

Taxation of Wherry Act Leaseholds

The bill would clarify congressional intent with respect to the rights of local communities to tax the interests of mortgagors under the Wherry Act mortgage insurance program (title VIII of the National Housing Act prior to the Housing Amendments of 1955) who have leased the mortgaged property from the United States. Under this program rental housing was provided for military and civilian personnel at or in areas adjacent to military installations. Most of this housing was built on land

owned by the Department of Defense and leased to the mortgagor corporation. As of May 1, 1956, the FHA had insured mortgages on 272 Wherry Act housing projects and the total of those mortgages amounted to about $391 million. State and local taxes are paid on more than half of these projects, although the extent of the payments often vary because of local circumstances other than the tax rate or value of the property.

Section 603 of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, the section would provide that any such taxes or assessments must be reduced (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. For purpose of these deductions, initial capital expenditures by the Federal Government for the services referred to could be allocated over such period of years as the Commissioner determined to be appropriate.

It would thus be made clear that States and communities under adequate State tax statutes, would

be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

The need for a clarification of this matter has existed since the initiation of the Wherry Act program because of the doubtful validity and effectiveness of various tax statutes of the States as applied to the interests of the mortgagor corporations where the projects are located on lands owned by the United States. The problem has involved the major constitutional question of the right of States to tax the mortgagor's leasehold interest, and has been complicated by the large variety of statutes in the individual States which local taxing officials have attempted to apply to the mortgagor's interests. There has been a substantial amount of litigation on this matter in State and lower Federal courts over the period of the program without uniformly resolving the questions involved. The recent decision of the Supreme Court of the United States in the case of Offutt Housing Company v. County of Sarpy (May 28, 1956) upheld the right of local taxing officials in the State of Nebraska to levy certain State and county "personal property" taxes against the lessee's interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, payments in lieu of taxes have frequently

been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies. As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provision in the bill for deductions from tax payments, as explained above.

Title VII—Miscellaneous

Farm Housing

Your committee is concerned over the substandard quality of much of the Nation's farm housing and over the difficulty many farmers face in obtaining adequate long-term housing credit at a reasonable cost. The most recent Census of Housing (1950) showed that 20 per cent of farm houses are in such a dilapidated condition that they need to be replaced or are in need of major repair; in contrast, less than 7 per cent of urban homes were classified as dilapidated.

The inadequacy of farm housing was serious in 1950 when farm income reflected 100 per cent of parity. With net farm income down nearly $4 bil-

lion since 1952, the difficulties facing many farm families in their attempts to correct farm housing deficiencies have multiplied.

To help meet this problem, section 701 of the bill would extend title V of the Housing Act of 1949 to provide for a 5-year farm housing program. Specifically, the bill would authorize (1) $450 million for direct farm housing loans to be available during a 5-year period; (2) an additional $10 million for contributions by the Secretary of Agriculture to prevent defaults in payments on loans for potentially adequate farms; and (3) an additional $50 million for grants and loans for improvements and repair to keep houses safe and sanitary and also to encourage family-size farms.

Your committee deeply regrets the administration's failure to implement the farm housing loan program under title V of the Housing Act of 1949. Despite consistent action each year on the part of Congress to extend the title V farm housing loan program, the program has been made a dead letter through administrative inaction and neglect. No loans have been made under the program since December, 1953, and your committee notes that a recent supplemental request on the part of the administration for $5 million to be used for fiscal 1956 will fall woefully short of meeting farm housing needs since such a sum would provide loans for only an estimated 830 farm families.

Your committee believes that an effective direct lending program under title V is a needed supplement to the farm housing loans available under title

I of the Bankhead-Jones Act. The loans under the Bankhead-Jones Act meet an important part of farm housing need, but they do not reach all of the area of need by any means. Loans under title I of the Bankhead-Jones Act are limited to owners of

Department of the Navy
Bureau of Yards and Docks

Washington 25, D. C.

Budocks 11011.42
C-540A/etj
12 July, 1957

Budocks Instruction 11011.42

From: Chief, Bureau of Yards and Docks
To: Distribution List

Subj.: Tax Deduction Determinations on Navy Wherry Housing Projects.

Ref:

(a). Sec. 408 of the Housing Amendments of 1955, as amended by Public Law 1020/84th Congress (70 Stat. 1110)

(b). DOD Directive No. 4165.30 dated 16 Nov., 1956

(c). DOD Instruction No. 4165.32 dated 27 Dec., 1956.

(d). U. S. Supreme Court Decision: Offutt Housing Co. v. County of Sarpy (Nebr.): 351 U. S. 253

(e). BuDocks Instruction 11101.12 dated 25 November, 1952

(f). Chapter 3 of NavDocks TP-AD-3 (as revised)

Encl.:

(1). SecNav Instruction 11101.29 of 3 June, 1957

(2). FHA Military Housing Letter No. 101 of 31 May, 1957

(3). Tax Deduction Determination Form

(4). Form of letter transmitting Determination to sponsor

(5). Form of letter transmitting Determination to the local Taxing Authority

(6). Form of letter transmitting Determination to the mortgagee

(7). Form of letter transmitting Determination to the cognizant FHA Field Director

(8). Tax deduction data Analysis and Report Form

1. Purpose. The purpose of this Instruction is to:

a. Implement references (a), (b), and (c), and enclosure (1).

b. Delegate certain authority vested in the Chief of the Bureau of Yards and Docks by enclosure (1).

c. Cancel reference (e) and promulgate revised policies and procedures in consonance with those contained in references (b) and (c) and enclosure (1).

d. Supplement the Instructions contained in reference (f) concerning the subject tax deduction determinations.

2. Cancellation. Reference (e) is hereby cancelled and superseded.

3. Background. References (e) and (f) pointed up the Navy's basic objective to minimize the impact of possible taxation of Wherry housing projects under Section 807 of Title VIII of the National Housing Act as amended (12 U. S. C. 1748f). They also outlined areas of legal and administrative action which might be successfully used to reduce or eliminate taxes from these projects. Some measure of success was achieved under the original legislation. However, with the release of reference (d), many projects hitherto accepted by the FHA and the local taxing authorities as not being subject to local taxation were promptly placed on the tax rolls. In several cases, the resulting high taxes precipitated rent increases to meet mortgagee and FHA tax escrow demands of such magnitude as to threaten mass move-outs from the projects and imminent financial failures followed by subsequent foreclosures. To provide relief from this situation reference (a) was enacted.

4. Delegation of Authority. Pursuant to the authority delegated to the Chief of the Bureau of Yards and Docks by enclosure (1), authority is hereby delegated to the District Public Works Officers to execute tax deduction determinations for all Navy and Marine Corps Wherry projects located within their respective Districts. In exercising the authority hereby delegated, the District Public Works Officers shall coordinate their actions

with the Commanding Officer of the Navy or Marine Corps activity primarily or exclusively served by the housing project under consideration. The authority above delegated to the District Public Works Officers shall not be further redelegated.

5. Functions and Responsibilities.

a. The District Public Works Officers shall proceed promptly to take the actions required by enclosure (1) for all Wherry housing projects in their respective areas of jurisdiction for which taxes or assessments are made or may be made on the leasehold interest of the lessees. This Instruction does not apply to those few Wherry projects where the sponsors hold fee simple title thereto. These projects are located at: Lakehurst, N.J., Green Cove Springs, Fla., one Section of the Cherry Point, N.C. project; Kearney Mesa, San Diego, Calif., and Moffett Field, Calif.

b. The District Public Works Officers shall assemble all necessary technical data, participate in negotiations with project sponsors and public officials, and perform such other functions as may be required for them to determine the appropriate deductions from taxes or assessments on Wherry projects, and in ascertaining the comparability of the taxes or assessments with respect to such projects to the taxes on other similar properties of similar value.

c. The Office of General Counsel representative on the staff of the District Public Works Officer shall provide legal services and advice relating to

any legal questions that may arise in the implementation of this Instruction.

d. The services of Bureau personnel and of the Office of General Counsel will be available for assistance as deemed necessary or appropriate by the District Public Works Officer, but the responsibility for making the final determination remains with the DPWO.

6. Procedures.

a. The DPWO Counsel will study local and state tax laws to satisfy himself that the project sponsor's leasehold interest is or is not legally subject to local taxation.

b. The Counsel's report to the DPWO will serve as the basis for the DPWO to either (1) advise the sponsor that his leasehold is not subject to taxation and therefore if taxes are paid they should be paid without prejudice to the sponsor's legal recourse to recover from the taxing authority; or (2) proceed with a tax deduction determination.

c. Where a project is found to be taxable, thus requiring a determination, the DPWO will draw from the following sources of information in assembling tax deduction data for his analysis and determination:

(1). Navy construction cost records of PL 155/82nd Congress funds used to assist in construction of the project.

(2). Navy records of operating costs of fire and police protection service (payroll, equipment M&O,

capital investment in equipment and buildings, etc.) provided by the Navy.

(3). Project sponsor's construction cost records on street and utilities installations.

(4). Project sponsor's annual M&O records on any of above facilities installations, as well as services rendered to the tenants.

(5). FHA records.

(6). Local community's budget operations for schools, streets, police and fire protection, etc.

(7). Local assessor's records.

(8). Department of Health, Education and Welfare payment reports, which will be furnished the DPWO by this Bureau in accordance with an agreement between the Department of Defense and the Department of Health, Education and Welfare. Any questions regarding the amounts reported by the Bureau should be referred to the Bureau for inquiry and discussion with HEW. Under no circumstances should figures covering school deduction items which might be volunteered by local HEW representatives or local school authorities be used in developing a formal Navy determination, since this Bureau has been advised by the Director of the Division of School Assistance, HEW, that only those figures furnished over his signature will be recognized and defended by that Department in the event the Navy's determination is contested.

d. Where possible, the DPWO will work closely with the local public officials and the project sponsor in preparing the list of items to establish (1) the appropriateness of including them as deductions,

and (2) the reasonableness of the amounts computed for each item. Consideration of these items is treated in detail later in paragraph 9 of this Instruction. The DPWO shall confer with the Commanding Officer of the Navy or Marine Corps activity involved in the case at hand before making his determination. He shall also keep the District Commandant concerned currently informed of the actions he is taking in connection with each tax deduction determination.

e. When the DPWO has obtained all of the facts available to him, he will carefully weigh them in arriving at the dollar amount deemed "appropriate" under the language of references (a), (b), and (c). He will then:

(1). Execute the formal Determination (enclosure (3)), and forward it to the project sponsor by letter patterned after enclosure (4).

(2). Forward signed copies of the Determination to the local taxing authority, the mortgagee, and the cognizant FHA Field Director, by transmittal letters patterned after enclosures (5), (6), and (7) respectively.

(3). Forward to the Director of the Mortgage Insurance Division, Federal Housing Administration, Washington 25, D. C. a copy of the letter to the local FHA, with a copy of the determination.

(4). Forward information copies of all of the above letters (with copy of determination) to:

(a). District Commandant concerned.

(b). Commanding Officer of activity concerned.

(c). Management Bureau or Office of naval activity concerned (or ComMarCorps in the case of a Marine Corps activity).

(d). Addressees of original letters listed in 6, c, (2) above, (without copy of determination).

(5). Prepare in quintuplicate a complete analytical report, including use of enclosure (8), and forward with copies of enclosures (3) through (7) to Chief, Bureau of Yards and Docks within 15 days of execution and distribution of a tax deduction Determination. This is necessary in order for this Bureau to comply with paragraph 6 of enclosure (1). The above report from the DPWO should also include documentary evidence of acceptance of the DPWO's determination, by the town, city, or county governing body where such agreement has been reached. In cases where the validity of the determination is challenged, either informally or by a legal action, (see paragraph 6 of enclosure (1)), a full statement should be made of this fact, whereupon this Bureau will determine what course of action should be pursued to overcome the objections.

(6). Maintain a close follow-up with all the addresses receiving the determination in order to accomplish the original purpose of the above action, namely, to reduce project rents to reflect the reduction or elimination of taxes from the sponsor's operating costs by reason of the Determination. In this connection, attention is directed to enclosure (2) which is the Federal Housing Administration's statement of policy and procedure addressed to its

Field Directors. Mortgagors and mortgagees should both be urged to make early, and if necessary, continuing requests to FHA for that agency to recognize the Navy Department's formal tax deduction determination, thereby giving proper effect to reference (a). The Navy will not concur with FHA in any recommendation for a rent increase necessitated by its failure to recognize the Navy's determination of a tax deduction pursuant to reference (a), notwithstanding the FHA's policy as stated in the sixth paragraph of enclosure (2).

(7). The DPWO will not have accomplished the objectives set forth in references (a), (b), and (c), and enclosure (1), and in this Instruction until he has succeeded in having rent reductions actually put into effect which reflect full recognition of this Determination. As stated previously, the Bureau is prepared to assist the DPWO to the maximum extent possible to accomplish this objective.

7. Discussion of Factors to Be Considered in Arriving at a Determination.

a. Taxibility of a Wherry sponsor's leasehold interest. The primary question involved here is: Is the sponsor's leasehold interest properly subject to taxation under the tax laws of the State within whose boundaries the project is located? The question of Congressional consent to such taxation has now been effectively removed from consideration by reason of (1) the U. S. Supreme Court's decision in reference (d), and (2) the passage by Congress

of reference (a). Nevertheless, it is still true that (1) the sponsor owns a leasehold interest in the project, while the United States has title to the land and improvements comprising the project, and that (2) in order to tax the sponsor's leasehold interest it is a prerequisite that a State have a tax law which taxes leasehold interests generally. The Nebraska statute upon which the Offutt Housing case turned was Nebraska Reissue (1950) Rev. Stats. of 1943, s. 77-1209, which provides in part, "all improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease * * * The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner * * *" Accordingly, the Supreme Court ruled that, under Nebraska law, the sponsor's leasehold is subject to tax and added: "In the circumstances of this case then, the full value of the buildings and improvements is attributable to the lessee's interest." However, in support of the statement above that there must be (as a prerequisite to taxation by a local authority) a State tax law in existence (as of the local assessment date) which reaches this type of leasehold, there is a decision by the Supreme Court of the Commonwealth of Massachusetts made on 11, February, 1957, (subsequent to the date of reference (d), (Squantum Gardens Inc., and another vs. Assessors of Quincy and another 140 N.E. 2nd. 482). wherein the Court held that under existing Massachusetts law a Wherry sponsor's leasehold interest in a project located in that State is not sub-

ject to local taxation. Two pertinent extracts are here quoted from the above Massachusetts decision, which have general applicability to the problem. They would be no less effective if read within the context of the decision.

(1) "Compliance with the Congressional permission thus has two aspects. It means both (1) that the State tax statute must authorize a tax of the character permitted by the Congress, and (2) that the administrative action of assessment and collection must comply with the Congressional and State statutory authorization.

(2). "* * * we are guided by the well recognized principle of statutory construction that 'tax laws are to be strictly construed. The right to tax must be plainly conferred by the statute. It is not to be implied. Doubts are resolved in favor of the taxpayer.' "

The Bureau's experience in dealing with local assessors and other public officials has revealed repeatedly that they have not been accurately apprised of the facts concerning a Wherry leasehold, and that when they were, in many cases the projects were removed entirely from the tax rolls, the local officials agreeing that their State tax laws were inoperative in such instances. Hence, the importance of a careful study of the local and state tax laws by DPWO Counsel, which may include discussions with local and State Attorneys and Tax Commissioners. It should not be assumed that because the project has been taxed in past years, it has been legally as-

sessed and therefore should continue on the tax rolls uncontested.

c. Comparability Study. Where it has been established that the leasehold is legally taxable, the following studies should be made. Since reference (a) provides in part that: "* * * no [state or local taxes or assessments] on this interest of [a lessee of a Wherry housing project from the Federal Government] shall exceed the amount of taxes or assesments on other similar property of similar value * * *" (emphasis added), it should be determined by a staff study of the assessment roll and a field check that the assessed value of this leasehold interest is comparable to other properties within the same taxing jurisdiction, and that the proper tax rate is being applied. This may also involve a comparative study of the statutory ratio to the actual assessment ratio in use. In many cases it may be found that the actual ratio falls well below the allowed statutory limit, in which case it should be ascertained that the assessor is using the same ratio on the Wherry project as he applies to other properties. Regarding the tax rate, in general, this is fixed by local ordinance and is not subject to modification. Once a property value is determined, the application of the legal tax rate determines the amount of (gross) taxes.

9. Deductions

a. Classification of Permissible Deductible Items.

Reference (a) states: "That no such taxes or assessments * * * shall exceed the amount of taxes or

assessments * * *, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal, or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property:" (Emphasis added.) Deductions should be made in connection with the types of items listed below if provided by (1) direct Federal payment to the local community to support its local public service programs, or by (2) expenditures by the Federal Government or the lessee to furnish facilities and services directly to the project tenants; provided such facilities or services are normally supplied through general taxation. It is probable, however, that in most taxing jurisdictions many of the items listed below (such as streets, sidewalks, and playgrounds or similiar facilities supplied on the development site) would be supplied by special assesment or would be paid for by the owner. In such cases, no deduction should be made for these items. The two types of items are as follows:

(1). Capital Expenditures, including schools, hospitals and clinics, libraries, streets and roads, street lighting equipment, sewage systems, mains, and facilities, water mains and facilities, fire protec-

tion facilities, hydrants, stations and equipment, sidewalks, curbs and gutters, public buildings, trash and garbage disposal plants, snow removal equipment, and parks and playgrounds.

(2). Annual expenditures for costs of operating and maintaining above items and for any other tax-supported services (irrigation, pest control etc.).

b. Limitations on Deductions.

With respect to "any payments made by the Federal Government * * *," this language is so inflexible as to preclude any latitude of interpretation. Any and all payments under this category (with respect to the project) are deductible without adjustments. However, in the case of expenditures by the Government or lessee, there is room to exercise discretion in determining the amounts "which may be appropriate" as deductible. The general rule to observe is, that payments or expenditures for which a deduction is contemplated must bear a direct relation to the project in order to comply with the language of the statute: "* * * with respect to such property," and "* * * services or facilities * * * customarily provided * * * with respect to such other similar property."

c. Measurement of Deductions.

In the case of a Federal (HEW) payment reported for school construction the DPWO should ascertain what the local community's school bonding practice is, that is, the repayment period of the bonds and the interest rate thereon. The amount of the Federal payment should then be amortized, in-

cluding interest on the unpaid principal, at a level annual amount. The period of amortization on other capital improvement items should be based on (1) local bonding practices—if the item is so financed by the community, or (2) the remaining mortgage period of the project, or (3) the remaining useful life of the item, or (4) a single full lump sum deduction if the item is customarily an annual line-item in the local community's budget. The choice of which one of the above methods to use is left to the DPWO.

In the case of operating and maintenance items, the full amount of annual Federal payment to the local community is deductible without adjustment as was explained above. For operating and maintenance expenditures by the Government or the lessee, reference (c) states that these amounts "may be computed as the actual cost or the portion of the local government's budget attributable to such services." The amount of the deduction should either equal the actual cost of the service or facility furnished, or should bear the same ratio to the total tax imposed as the taxing authority's budgeted item for the same service or facility bears to its total budget, whichever is the lesser. The reasons for the method selected should be explained in the DPWO's report to the Bureau.

10. Action required of the Sponsor

In consonance with the objective stated in paragraphs 6e(6) and 6e(7) above, the DPWO should urge the sponsor to (1) promptly furnish evidence to the FHA of his demand on the local taxing au-

thority to reduce taxes in recognition of the Military's determination, and (2) pursue a vigorous follow-up with his mortgagee and the FHA to have the tax escrow requirement reduced, thus leading to a corresponding adjustment in the project rents.

11. Periods covered by, and Frequency of, Determinations

These determinations must be made for every tax year. Care should be exercised in developing the initial determination, both as to the method of arriving at the appropriate dollar amount and in relating the deductions to a specific twelve-month period which either coincides with the local tax year or is correlated as nearly as possible to it. In most taxing jurisdictions the tax year coincides with the calendar year. The period to be covered for those items under the category of expenditures made by the Federal Government or the sponsor should cover the last previous tax year. Where the sponsor's fiscal year or the Federal fiscal year does not coincide with the local tax year, it will be necessary to adjust to the local tax year. Whatever periods are used in the initial calculations leading to the first determination must be used in each succeeding year in order to avoid possible overlaps or gaps in the periods for which the tax deduction determination is being computed.

/s/ R. H. MEADE,
Rear Admiral, CEC, USN,
Chief of Bureau

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Bureau of Yards and Docks—Enclosure (1)

Department of the Navy
Office of the Secretary
Washington 25, D. C.

BUDOCKINST 11011.42—12 July, 1957.
SECNAV 11101.29
BUDOCKS C-540A/etj
3 Jun., 1957.

SECNAV Instruction 11101.29
From: Secretary of the Navy.
To: Distribution List.

Subj.: Determination of Amounts of Deductions From Taxes on Wherry Family Housing Projects.

Ref.: (a) Section 408 of Title IV of the Housing Amendments of 1955, as amended by Public Law 1020, 84th Congress (70 Stat. 1091).

Encl.: (1) DOD Directive 4165.30 of 16 Nov., 1956.
(2) DOD Instruction 4165.32 of 27 Dec., 1956.

1. Purpose. The purpose of this Instruction is to:

a. State the policy of the Department of the Navy with respect to implementing reference (a) pursuant to the policies and instructions set forth by the Department of Defense in enclosures (1) and (2) governing the determination of appropriate deductions from taxes or assessments on the interests of lessees of Wherry housing projects.

b. Delegate authority and assign responsibility within the Department of the Navy for making such determinations.

c. Implement the policies and procedures contained in enclosures (1) and (2).

2. Background. Reference (a) provides that: "* * * no (state or local taxes or assessments) on the interest of (a lessee of a Wherry housing project from the Federal Government) shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property * * *" Since the above refers specifically and exclusively to Wherry lessees'

interests, those few projects in the Navy's Wherry program owned in fee simple title by the Wherry sponsors rather than by the Federal Government, are not affected by this Instruction.

3. Policy. It is the policy of the Department of the Navy:

a. To take full advantage of the deductions authorized by reference (a) in order to hold to the minimum the amounts that must be collected in rents from the occupants of Wherry projects for payment of taxes.

b. To assist the lessees of Wherry projects in appropriate actions to obtain acceptance by local taxing authorities, mortgagees, and the Federal Housing Administration of the deductions as determined by the Department of the Navy in accordance with reference (a).

c. In determining the amounts which may be appropriately deducted from taxes or assessments on Wherry projects, to co-operate with taxing authorities and other public agencies, and to render all possible assistance to them.

4. Delegation of Authority. The authority vested in the Secretary of the Navy by enclosure (1) is hereby redelegated to the Chief of the Bureau of Yards and Docks or his designee for all Navy and Marine Corps Wherry housing projects. In exercising the authority hereby delegated, the Chief of the Bureau of Yards and Docks or his designee shall co-ordinate with the Commanding Officer of the Navy or Marine Corps activity primarily or

exclusively served by the housing project under consideration before making the required determinations, and shall keep the District Commandant concerned currently informed of the actions taken.

5. Action:

a. The Chief of the Bureau of Yards and Docks shall issue such further instructions as may be necessary to implement reference (a) in detail, and shall exercise co-ordination control within the Department of the Navy with respect to administering and executing the provisions of reference (a).

b. The Chief of the Bureau of Yards and Docks, or his designee, shall take the actions required under Section IV of enclosure (2) for all Wherry housing projects serving exclusively or primarily Navy and Marine Corps activities, for which taxes or assessments are made on the interests of lessees.

6. Reports required. The Chief of the Bureau of Yards and Docks shall prepare the reports required under Section V of enclosure (2) for transmittal by the Assistant Secretary of the Navy (Material) to the Assistant Secretary of Defense (Properties and Installations) and the Secretaries of the other military departments as required. If the validity of the determination is challenged, or if it is anticipated that it shall be challenged, or if it is not accorded full force and effect, this information should be included in the report, or a supplemental report should be forwarded promptly in accordance with Section 5 of enclosure (2). Copies of these reports shall be furnished to the Chief of the Man-

agement Bureau concerned (or Commandant of the Marine Corps as appropriate), the Commandant of the Naval District, and to the Commanding Officer of the activity primarily or exclusively served by the project.

/s/ F. A. BANTZ,
Assistant Secretary of the
Navy (Material).

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[Seal]

November 16, 1956.

Number 4165 30

Department of Defense Directive

Subject: Taxes on Wherry Housing Projects.

Reference: (a) Section 511, Public Law 1020, 84th Congress (70 Stat. 1110).

Pursuant to the authority vested in the Secretary of Defense by Section 202(f) of the National Security Act of 1947, as amended, and Section 5 of the Reorganization Plan No. 6 of 1953, the authority conferred on the Secretary of Defense by reference (a) is hereby delegated as set forth below.

The Assistant Secretary of Defense (Properties and Installations) is delegated the authority to:

1. Issue instructions for the guidance of the military departments in making determinations under reference (a) as to the amounts which may appropriately be deducted from the taxes or assessments on Wherry projects.

2. Enter into agreement with the head of any executive department or agency of the Federal Government for the furnishing of information regarding the amount of any payments or other contributions made to local taxing or other public agencies with respect to Wherry projects or for establishing procedures to facilitate implementation of reference (a).

3. Perform such functions under reference (a) as are not otherwise delegated to the Secretaries of the military departments.

The Secretary of each military department, or his designee, is hereby delegated the authority to:

1. Determine the amounts which may appropriately be deducted under reference (a) from taxes or assessments on Wherry projects.

2. Assist the lessees of Wherry projects in furnishing information regarding appropriate deductions to local taxing authorities for the purpose of fixing the net amount of taxes to be paid on Wherry projects.

/s/ C. E. WILSON,
Secretary of Defense.

Lodged October 14, 1957.

[Title of District Court and Cause.]

United States District Court, Southern District of California, Central Division

MINUTES OF THE COURT

Date: October 22, 1957.
At: Los Angeles, Calif.
Present: Hon. Wm. C. Byrne, District Judge.
Deputy Clerk: Charles E. Jones.
Reporter: None.
Counsel for Plaintiff: No appearance.
Counsel for Defendant: No appearance.
Proceedings: On Court's own motion.

It Is Ordered that plaintiff's application for a preliminary injunction is Denied.

It Is Further Ordered that the Order to Show Cause is discharged and the temporary restraining order is dissolved.

It Is Further Ordered that defendants' motion is granted and the action is dismissed.

It Is Further Ordered that counsel for defendant is directed to prepare, serve and lodge findings and conclusions pursuant to Rule 52, FRCP, covering the refusal of the preliminary injunction and an Order of Dismissal covering the motion to dismiss all in accordance with local Rule 7.

Counsel notified.

JOHN A. CHILDRESS,
Clerk;

By .....,
Deputy Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER DENYING PRELIMINARY INJUNCTION

The Court finds as follows:

Findings of Fact

I.

This is a proceeding by a California corporation to enjoin, suspend and restrain the collection of taxes by the County of San Bernardino through its officers under the law of California, and for a declaratory judgment that said taxes are not due or owing to said County by plaintiff.

II.

That plaintiff has a plain, speedy and efficient remedy in the courts of the State of California.

Conclusions of Law

Because of plaintiff's plain, speedy and efficient remedy in the courts of the State of California, and the proscription of 28 U.S.C. 1341, this court may not grant plaintiff the injunctive relief it seeks in this action.

Order

In accordance with the foregoing findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed:

1. That application for preliminary injunction on file herein be denied;

2. That the temporary restraining order, previously issued herein, be and the same is hereby dissolved.

Dated: November 7th, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed and entered November 7, 1957.

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

Defendants' motion to dismiss upon the ground that plaintiff has not stated a claim upon which relief can be granted having come on for hearing before this court on the 17th day of October, 1957, and

It appearing to the court that this is an action to enjoin, suspend and restrain the collection of a state tax, and that a plain, speedy and efficient remedy is available to the plaintiff in the state courts, and

It further appearing that by reason of the provisions of 28 U.S.C. 1341, this court cannot grant the plaintiff relief on its claim to enjoin, suspend and restrain the collection of state taxes, where a plain, speedy and efficient remedy is available in the state courts,

Now, Therefore, It Is Hereby Ordered that the action be and it is hereby dismissed.

It Is Further Ordered that this dismissal shall not operate as an adjudication on the merits.

November 7th, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed and entered November 7, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harsh California Corporation, a California corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order dismissing the action entered in this action on November 7, 1957.

HOLBROOK, TARR &
O'NEILL,
/s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Appellants, Harsh California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harsh California Corporation, a California corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying preliminary injunction entered in this action on November 7, 1957.

HOLBROOK, TARR &
O'NEILL,
/s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Appellants, Harsh California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

MOTION AND ORDER TO EXTEND THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Plaintiff respectfully requests the Court, pursuant to Rule 73(g) of the Rules of Civil Procedure, to extend the time for filing the record on appeal and docketing the appeal to ninety days from the date of filing the first notice of appeal on March 3, 1958.

Dated December 26, 1957.

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Harsh California Corporation.

Order

Good cause appearing therefor and pursuant to Rule 73(g) of the Rules of Civil Procedure, the time for filing the record on appeal and docketing the appeal is extended to ninety days from the date of filing the first notice of apeal on March 3, 1958.

Dated: December 26, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.
[Endorsed]: Filed December 27, 1957.

United States Court of Appeals
for the Ninth Circuit

No. 1034-57-WB

HARSH CALIFORNIA CORPORATION, California Corporation,

Plaintiff,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic, et al.,

Defendants.

MOTION AND ORDER EXTENDING THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Plaintiff respectfully requests the Court to extend the time for filing the records on appeal and docketing the appeals to sixty (60) days from March 3, 1958, the date on which said docketing and filing is now due.

The orders dismissing the above action and denying a preliminary injunction were entered on November 7, 1957. Notices of appeal therefrom were filed on December 4, 1957.

On December 26, 1957, a motion to extend the time for filing the records on appeal and docketing the appeals, pursuant to Rule 73(g) of the Federal Rules of Procedure, was filed in the United States District Court, Southern District of California, Central Division, and an order extending said time for

fifty (50) days was signed by the Honorable Judge William Byrne on the same date. The fifty-day extension expires on March 3, 1958.

No other motion for extension of time has been presented to any Judge of the Ninth Circuit.

Plaintiff requests this extension because, at the present time, an action by the defendant, County of San Bernardino, against plaintiff herein, involving the same matter, is before the Superior Court of the State of California. It is very possible that the State action will resolve the questions raised in this appeal. In such event, the time of the Court, as well as counsel for both sides, would be well saved by granting this motion.

Dated: February 13, 1958.

HOLBROOK, TARR &
O'NEILL,
By /s/ FRANCIS H. O'NEILL,
Attorneys for Plaintiff.

Counsel for defendants in the above-entitled action have no objection to the granting of the order requested above.

ALBERT E. WELLER,
County Counsel;

By /s/ J. B. LAWRENCE,
Deputy County Counsel.

Order

Good cause appearing therefor, the time for filing the records on appeal and docketing the appeals in the above-entitled action is extended sixty (60) days from March 3, 1958.

Dated: 2-14-58.

/s/ STANLEY W. BARNES,
United States Circuit Court Judge.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 145, inclusive, containing the original:

Complaint for Declaratory Relief, Injunction and Restraining Order.

Order to Show Cause.

Temporary Restraining Order.

Motion to Dismiss.

Plaintiff's Points and Authorities in Opposition to Defendant's Motion to Dismiss.

Defendant's Reply in Support of Motion to Dismiss.

Plaintiff's Supplemental Points and Authorities in Opposition to Defendants' Motion to Dismiss.

(Photocopy) Documents Lodged With the Court 10/14/57.

Plaintiff's Points and Authorities on Court Directed Question of Federal Jurisdiction.

Defendant's Points and Authorities on Lack of Jurisdiction.

Findings of Fact, Conclusions of Law and Order Denying Preliminary Injunction.

Order Dismissing Action.

Notice of Appeal From Order Dismissing Action.

Notice of Appeal From Order Denying Preliminary Injunction.

Motion and Order Extending Time for Filing Record and Docketing Appeal, filed 12/27/57.

Motion and Order Extending Time for Filing Record and Docketing Appeal, dated 2/13/58.

Designation of Record on Appeal.

Appellees' Supplemental Designation of Record on Appeal.

B. Minute Order of 10/14/57 re Hearing Motion to Dismiss Complaint.

Minute Order of 10/22/57 re Denial of Plaintiff's Application for Preliminary Injunction, etc.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: April 21, 1958.

JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15991. United States Court of Appeals for the Ninth Circuit. Harsh California Corporation, a Corporation, Appellant, vs. County of San Bernardino, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15991

HARSH CALIFORNIA CORPORATION, a California Corporation,

Appellant,

vs.

COUNTY OF SAN BERNARDINO, a Body Corporate and Politic; S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as Members of and Constituting the Board of Su-

pervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino,

Appellee.

APPELLANT'S STATEMENT OF POINTS RELIED UPON ON APPEAL, PURSUANT TO RULE 75 OF FEDERAL RULES OF CIVIL PROCEDURE

Comes Now the Appellant, Harsh California Corporation, a California corporation, pursuant to Rule 75 of the Federal Rules of Civil Procedure and states that it intends to rely on the following points in the Appeal of the above-entitled case:

1. The District Court erred in denying Appellant's application for declaratory relief, to wit:

That the credit, offset and deductions in the sum of $27,759, as demanded, pursuant to Section 408 of the National Housing Act of 1955, as amended, by the designee of the Secretary of Defense, to have been expended by the United States of America with respect to such property is a valid and complete credit, offset and deduction from 1957-58 taxes claimed by the defendant, County of San Bernardino, to be owing to it from plaintiff on account of plaintiff's "possessory interest and all other right, title and interest" arising out of plaintiff's lease from the United States of America of certain lands and buildings, owned by the United States of America; that the entire demanded amount of said 1957-58 taxes claimed by defendant, County of San Ber-

nardino, from Appellants is the sum of $21,388; and that therefore there is no sum at all due, owing or unpaid to defendant County from Appellants on account of said 1957-58 taxes.

2. The District Court erred in denying Appellant's application for injunction restraining defendants, their agents, servants, employees and all persons, in active consort and participating with them, from doing any and all acts to enforce the said tax or any penalty thereon against Appellants.

3. The District Court erred in denying Appellant's application for a Temporary Restraining Order, pending final hearing and determination of this cause on its merits, restricting defendants and each and all of them from doing any and all acts to enforce and collect the alleged tax on Appellant's "possessory interest and all other right, title and interest" in the aforesaid lease from the United States of America.

4. The District Court erred in finding and holding the Appellants had a plain, speedy and efficient remedy in the courts of California as there was no relief in said courts of the State of California available to Appellants for the following reasons:

a. There is no provision in the Constitution or laws of the State of California for allowance of a credit, offset or deduction of sums of money paid by the United States of America to the State of California, or its subordinate entities from or against amounts claimed by the State of California or its subordinate entities by way of ad valorem

taxes; and there is no procedure provided by cancellation, in part or whole, of any ad valorem taxes previously levied, by virtue of payment made by the United States of America which is provided under the laws of the United States of America to be a credit, offset or deduction against said ad valorem taxes.

b. That the Constitution and laws of the State of California provides no relief in this type of situation involving said ad valorem taxes as the only Declaratory Relief Act of said State (Cal. C.C.P., Sec. 1060) is restricted to cases involving deeds, wills, written instruments, or under contracts or which involve the location of a natural channel of a water course, and it has been expressly held in California that there is no "contractual" right involved in an ad valorem tax matter.

c. That the Constitution and laws of the State of California do not provide any remedy or method for the refund of taxes collected by way of payment under protest of the said tax and suit thereafter to recover the same pursuant to California Revenue & Taxation Code, Sections 5136-5143, unless the assessment is claimed to be void; that the assessment here is not claimed to be void; but an offset under Federal law by virtue of a payment in excess of the taxes levied under the valid assessment, is the sole basis of the claim sought to be raised here.

d. That under the Constitution and laws of the State of California there is no Statutory remedy for refund of taxes here sought to be collected under the provisions of the "refund" sections of the Cali-

fornia Revenue & Taxation Code, Sections 5096-5107, which are restricted to a situation where the taxes "refunded" are erroneously or illegally collected and it is admitted here that the assessment and tax were legally levied and, therefore, under California law, its collection would not be illegal or erroneous.

e. That under California Constitution and laws there is no Statutory remedy pursuant to California Revenue & Taxation Code, Sections 4986-4994, available to a taxpayer to compel, prior to payment, cancellation of the whole, or any portion of an assessment, by reason of the fact that the herein assessment is not claimed to be erroneous or illegal and further by reason of the fact that the Supreme Court of California has determined and held that the remedy provided in said sections of the Revenue & Taxation Code is not enforceable in a court of law by a citizen or taxpayer.

f. That the common law remedies of Mandamus, Certiorari and Injunction are not available in the Courts of the State of California to a taxpayer protesting or otherwise claiming that the taxes levied against his property are improper, erroneous or illegal by virtue of decision of the California Supreme Court which held that such remedy is not available in a matter involving taxes.

5. That the District Court erred in concluding that 28 U.S.C. 1341 prohibited the District Court from granting Appellant the relief it sought and in concluding that 28 U.S.C. 1341 was applicable to the situation here involved, as there was no plain,

speedy and efficient remedy in law or fact available to Appellant in the courts of the State of California.

Dated: This 30th day of April, 1958.

HOLBROOK, TARR &
O'NEILL,

By /s/ W. SUMNER HOLBROOK, JR.,
Attorneys for Plaintiff-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1958.